

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

2-----x UNITED STATES OF AMERICA,
3 Plaintiff,

PROBATION OFFICE

4 CR 203

5 versus United States Courthouse
6 225 Cadman Plaza East
7 Brooklyn, N.Y. 11201

DUPREE HARRIS,

8 DEFENDANT.

9-----x
10 July 20, 1999
11 5:00 p.m.

12 TRANSCRIPT OF SENTENCE

13 Before: HON. ALLYNE R. ROSS,

DISTRICT COURT JUDGE

14 APPEARANCES

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25 Proceedings recorded by mechanical stenography, transcription
by CAT.

ALLAN R. SHERMAN, CSR, RPR Official Court Reporter
United States District Court Eastern District of New York

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2 THE COURT: Addressing the advisory guidelines
3 disputes, I find that record overwhelmingly supports the
4 probation department's conclusion that defendant's base
5 offense level is 38 as the crack cocaine conspiracy defendant
6 organized and led distributed far in excess of 1.5 kilograms
7 of crack cocaine based on the trial evidence.

8 This was established in part by the credible
9 testimony of trial witnesses cited at page 4 of the
10 government's letter brief.

11 The conclusion as to amount of crack cocaine for
12 which defendant was responsible as reasonably foreseeable to
13 him by virtue of his leadership of the conspiracy was also
14 supported by the credible testimony of a number of other
15 government witness at trial.

16 Defendant's argument that the trial evidence does
17 not support this conclusion is unfounded. Based on the trial
18 evidence, it is similarly clear that the role Harris played in
19 the conspiracy merits the 4 level enhancement. Plainly, the
20 conspiracy involved five or more participants. These
21 included, to mention just a few, Harris, Cobb, McDonald,
22 McIntosh, Harley, Barrett, Reed, Pettit, Wright, King,
23 Cleveland, Blacksheer and Helm.

24 Further, Harris was amply proven to be the leader
25 and organizer of the conspiracy, occupying a role of far

1 greater significance than his only manager, Cobb.

2 The testimony of the witnesses was overwhelming that
3 Harris was squarely in charge of the organization and that his
4 manager Cobb was wholly subordinated to Harris' authority.

5 It was clear that Harris had the ultimate
6 decision-making authority and that he controlled all of the
7 others directly or indirectly. The testimony was also clear
8 that Harris supplied virtually all of the crack and ultimately
9 received all or most of the proceeds with the exception of
10 amounts paid to Cobb and the distributors. Harris directly
11 recruited at least four of the dealers and through Cobb
12 recruited others.

13 The evidence also established that apart from basic
14 day-to-day operations, Cobb, Harris' only manager, had
15 relatively little authority. Harris also took the lead in
16 protecting the organization through show of force and
17 violence. For example, when Barrett tried to persuade Reed
18 not to distribute Harris' crack cocaine, Harris threatened
19 Barrett with a gun to prevent his interference. When Sway, a
20 rival drug dealer began to sell crack near Harley's apartment
21 which became an important distribution center for the
22 conspiracy, Harris viciously beat Sway.

23 The evidence of Harris' frequent absence from the
24 Glens Falls area in no way detracted from the central
25 significance of his role in the organization.

1 As the government points out, Harris, the sole
2 organizer and leader of the conspiracy, employed many means
3 for maintaining his control over the organization including
4 his more than 700 telephone calls to Cobb, King and
5 Blacksheer. Nor did Harris' employment of a manager, Cobb, in
6 any way diminish the centrality of Harris' role.

7 The evidence established that Cobb's role, though
8 managerial, was of dramatically lesser importance to the
9 conspiracy, so much so that I view the vast discrepancy
10 between their roles as a factor somewhat mitigating the
11 seriousness of Cobb's criminal conduct.

12 Harris' adjusted offense level under the advisory
13 guidelines is thus correctly calculated by the probation
14 department at level 42. Although Harris disputes various
15 aspects of his criminal history calculation, he acknowledges
16 that even if he were to prevail on all of his arguments, his
17 criminal history category would remain at category six.

18 Accordingly, defendant's advisory guidelines given
19 an adjusted offense level of 42 and a criminal history
20 category of six carry a range of imprisonment from 360 months
21 to life.

22 In addition to his conviction of the conspiracy
23 count, count two, and the substantive distribution count,
24 count four, defendant was also convicted of a charge of use of
25 a firearm in furtherance of a drug trafficking crime, count 3.

1 Defendant argues that notwithstanding the trial
2 evidence establishing that he brandished a firearm, which
3 under Section 924(c)(1)(A)(ii), carries a mandatory minimum
4 consecutive term of seven years imprisonment, he can not be
5 sentenced to more than five years for this conviction because
6 the jury was not asked to make a special finding of
7 brandishing beyond a reasonable doubt.

8 The government is correct, however, that defendant's
9 argument is foreclosed by the decision of the Supreme Court in
10 Harris versus United States, 536 U.S. 545, 2002. In Harris,
11 the Supreme Court held that brandishing a firearm within the
12 meaning of 18 United States Code Section 924(c)(1)(A) is a
13 sentencing factor rather than an element of the crime.
14 Because it does not increase defendant's sentence beyond the
15 statutory maximum, the Court concluded, it may be determined
16 by the Court by a preponderance of the evidence rather than by
17 a jury.

18 The Second Circuit in an unpublished opinion in
19 United States versus Mackie, 2005 WestLaw, 3263787, Second
20 Circuit 2005, recently held that regardless of the merits of
21 the argument that Booker undermined Harris, "We must reject
22 it". The Circuit wrote: "This Court must adhere to Supreme
23 Court precedent unless and until the Supreme Court itself
24 overrules it". Citing State Oil Company versus Kahn, 522 U.S.
25 3 at 20, 1997.

1 Accordingly, I am required to sentence defendant on
2 count two to seven years imprisonment consecutive to his
3 sentence on counts two and four.

4 Turning to the sentencing statute, I am persuaded
5 based on an assessment of the statutory factors, that the
6 sentence yielded by the advisory guidelines, that is a total
7 of 37 years imprisonment, is of sufficient but not undue
8 severity to accomplish the goals of sentencing.

9 As to the nature and circumstances of the offense, I
10 consider defendant's criminal conduct that was the subject of
11 this prosecution as extraordinarily serious. The conspiracy
12 defendant organized and led distributed a massive amount of
13 crack cocaine, far exceeding the amount calling for the
14 maximum base offense level of 38.

15 To maintain control of the crack cocaine
16 organization, defendant did not hesitate to employ violence,
17 for example, when he pointed a gun at Barrett to dissuade him
18 from interfering with the conspiracy's use of Reed and her
19 apartment for the distribution of crack cocaine; or when he
20 violently beat Sway, a rival drug dealer, or forced another
21 individual to deal drugs for him under threat of serious
22 bodily injury.

23 Further, additional evidence established that Harris
24 carried a firearm in furtherance of the conspiracy for
25 protection and intimidation.

1 Indeed, had the government not chosen to separately
2 prosecute him for the firearms offense, which would have
3 resulted in a two level enhancement in his adjusted offense
4 level for use of a firearm in furtherance of a conspiracy had
5 he not been prosecuted for the firearms offense, Harris'
6 advisory guidelines would have called for a term of lifetime
7 imprisonment.

8 Defendant's pivotal organizational and leadership
9 role as previously described is yet another factor aggravating
10 the seriousness of his offense.

11 Turning to the history and characteristics of the
12 defendant, at the age of 31 he has established himself as a
13 habitual violent offender with a criminal history placing him
14 squarely within the highest criminal history category, six.
15 Prior to his most recent sentence to 15 years to life for
16 bribing witnesses to influence their testimony, defendant's
17 convictions included multiple weapons offenses and crimes
18 involving narcotics and grand larceny.

19 In connection with his most recent sentence, a
20 justice of the New York State Supreme Court adjudicated Harris
21 under New York Penal Law Section 70.10 as a persistent felony
22 offender requiring extended incarceration and lifetime
23 supervision, commenting that he: "Has performed criminal acts
24 repeatedly with very little time in between to do anything
25 else".

1 The government has also chronicled at pages 12 to 14
2 of its sentencing submission alleged criminal conduct by the
3 defendant that has not resulted in any conviction.

4 I do not find it necessary to rely on these matters
5 in reaching a conclusion regarding an appropriate sentence in
6 this case. Notably, it cannot seriously be disputed that four
7 of defendant's convictions, including his conviction in the
8 instance case, were for crimes during a period of parole or
9 supervision. While defendant's submissions demonstrate strong
10 support by his family and friends, I am in agreement with
11 Judge Demarest, that such support is overwhelmingly outweighed
12 by the persistence and seriousness of the defendant's record
13 of criminal conduct.

14 Finally, defendant's contention that his restricted
15 conditions of confinement warrant leniency in sentencing are
16 substantially undercut by certain of the justifications for
17 imposing them which were previously addressed in this Court's
18 July 1st, 2005 opinion and order concerning an anonymous jury
19 and are again documented in part by the government's
20 sentencing submission. But in any event, even assuming all of
21 that, defendant's conditions of confinement contentions are
22 more than sufficiently accommodated by my decision to run
23 defendant's federal sentence concurrently with the
24 undischarged portion of defendant's state sentence,
25 notwithstanding the fact that defendant's criminal conduct in

1 the two cases is wholly unrelated.

2 In sum, I conclude that this 31 year old defendant
3 is a habitual violent criminal who must be segregated to
4 protect society from his well established recidivism and the
5 violent harms he has repeatedly inflicted on others.

6 Given the selected sentence, defendant will not be
7 released to society until he is into his 60s at a time when
8 his recidivism and criminal tendencies should have
9 considerably abated.

10 Accordingly, I sentence the defendant on count two
11 to the custody of the Attorney General for a period of 360
12 months which is consecutive to the sentence on count 3, but
13 concurrent with the sentence on count four and the
14 undischarged term of imprisonment the defendant is serving, to
15 be followed by a five year period of supervised release.

16 I sentence the defendant on count four to the
17 custody of the Attorney General for a period of 240 months to
18 run consecutively to the seven year term on count 3 but
19 concurrently with the term he will be serving on count two and
20 the undischarged term of imprisonment the defendant is
21 serving, and that entails a three year period of supervised
22 release.

23 Finally, on count 3, I sentence Mr. Harris to seven
24 years custody to be imposed to run consecutively to the
25 sentence on counts two and four and a five year period of

1 supervised release.

2 I'm going to impose as a special condition of
3 supervised release a search condition. This is based on the
4 nature of the offense that was the subject of the trial before
5 me. The defendant shall submit his person, residence, place
6 of business, vehicle or any other premises under his control
7 to a search on the basis that the probation officer has
8 reasonable belief that contraband or evidence of a violation
9 of conditions of relation may be found.

10 The search must also be conducted in a reasonable
11 manner, at a reasonable time. Failure to submit to a search
12 may be grounds for revocation and the defendant shall inform
13 any other residents that the premises may be subject to search
14 pursuant to this condition.

15 I also prohibit the possession of a firearm. I make
16 a finding Mr. Harris is unable to pay a fine but I will impose
17 the mandatory 300-dollar special assessment.

18 I make no recommendation to the Bureau of Prisons
19 with respect to the level of confinement. I believe the
20 Bureau of Prisons has at least as much information as I do,
21 but insofar as consistent with whatever the needs are of the
22 Bureau of Prisons for designation, I recommend that he be
23 housed in a facility as close as possible to the New York
24 area.

25 Obviously, Mr. Harris, you know you are entitled to

1 appeal the conviction, you are entitled to appeal the
2 sentence. I'm sure Ms. Richman will seek to remain your
3 lawyer through that process.

4 A notice of appeal must be filed within 10 days and
5 I am sure that Ms. Richman will file a notice of appeal within
6 the stated period.

7 MS. RICHMAN: Might I add two points just to correct
8 you.

9 Mr. Harris is now 33 years old.

10 THE COURT: Thank you.

11 MS. RICHMAN: And under the marshal system, he is
12 still designated under SAMS which if you can direct
13 corrections, the card has been checked today.

14 THE COURT: Honestly, I have no knowledge of any of
15 this. I can't do anything.

16 MS. RICHMAN: I just wish to make it clear,
17 your Honor, that there is still a problem.

18 THE COURT: I have invited you from the beginning,
19 if there is some separate vehicle by which I or someone else
20 should be addressing any of these matters, then do it.

21 MS. RICHMAN: I shall.

22 Thank you, your Honor.

23 MR. FREEDMAN: Good evening, your Honor.

24 MS. RICHMAN: May I simply give him legal documents
25 because a number of things have been returned to me and some

1 of the things that I have submitted to him --

2 THE COURT: I'm looking at the marshals.

3 Is there a problem?

4 (Matter concluded.)

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